Supreme Court, U.S.
FILED
JUL 27 1998
OFFICE OF THE CLERK

No. 97-1472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL A. HADDLE,

Petitioner,

v.

JEANETTE G. GARRISON, DENNIS KELLY, G. PETER MOLLOY, JR., HEALTHMASTER, INC., CHRISTOPHER GARRISON, individually and as Trustee for certain trusts, and JOHN DOES 1 through N, individually and as Trustees of certain trusts,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND GOVERNMENT ACCOUNTABILITY PROJECT IN SUPPORT OF PETITIONER

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23 pp

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The National Employment Lawyers Association moves for leave to file a brief as *amicus curiae*. The issues to be decided herein affect the interest of this organization, its members, and their clients as set forth in the statement of interest of the accompanying brief.

We have obtained letters of consent from the petitioner and four of the five named respondents; however, we have been unable to obtain a letter of consent from respondent Dennis Kelly. Barry J. Armstrong, counsel for Jeanette G. Garrison, Christopher Garrison, and Healthmaster, Inc., informed us that Kelly is currently serving a jail sentence and has not been actively involved in the litigation of this case. Michael Pascual of the National Whistleblower Center (NWC), another organization filing an *amicus* brief in this case, then informed us that he located Kelly at the Effingham County Jail in Springfield, Georgia, but that Kelly withheld consent to the filing of NWC's brief. Paula Brantner, my cocounsel on this brief, contacted the Effingham County Jail and verified that Kelly was imprisoned there; however, as of the time of this filing, Kelly had not returned Ms. Brantner's call or granted consent to this filing.

MARK ALLEN KLEIMAN

Dated: July 24, 1998

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INTEREST OF THE AMICI CURIAE[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in employment, labor, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law issues. Some recent cases before this Court include: *Faragher v. City of Boca Raton*, U.S.Sup.Ct. No. 97-282, 66 USLW 4643 (decided 6/26/98); *Burlington Industries v. Ellerth*, U.S. Sup.Ct. No. 97-569, 66 USLW 4634 (decided 6/26/98); and *Oncale v. Sundowner Offshore Services Inc. et al.*, 118 S.Ct. 998 (1998). In addition, NELA and its state and local affiliates have participated as *amici* in cases involving whistleblower issues before state courts.

NELA members have brought numerous cases under the Reconstruction era civil rights laws, as well as whistleblower cases under state law. In fact, NELA members have devoted an active committee to discussing developments in the area of whistleblower protection laws.

This decision represents a tremendous limitation on at-will employees who cooperate in federal investigations of their employer's wrongdoing. The Eleventh

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[1] No counsel for a party authored this brief in whole or in part. No persons other than the *Amici Curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

Circuit's holding essentially allows employers to stifle such cooperation by firing, or threatening to fire, at-will employees under these circumstances. Employee witnesses, who may otherwise assist the federal government in investigations, will be chilled from doing so, for fear of retaliation. Among the anomalous results will be that the targets of government investigations will be able to suppress probative evidence by precluding witnesses' testimony before federal courts. Employees will then be forced to choose between upholding the law or keeping their jobs. NELA submits this brief to address these concerns of law and policy. In so doing, NELA seeks to protect the interests of its members and their clients, by helping to ensure that the goals of the Civil Rights Act of 1871 are fully realized.

The Government Accountability Project (GAP) is a non-profit, non-partisan public interest law firm started in 1978 to provide support for whistleblowers, those employees who challenge illegality or other institutional misconduct undermining the public interest that they discover in the course of their employment. GAP assists whistleblowers by counseling and diagnosing legal options for those who seek help; legally representing whistleblowers who exercise free speech rights to defend themselves against retaliation; representing whistleblowers to be more effective in challenging institutional misconduct that they disclose; helping to defend and strengthen whistleblower laws; sponsoring legal and public education conference on whistleblowing; and authoring publications ranging from survival manuals to law review articles. *See, e.g., A Whistleblower's Guide to the Federal Bureaucracy* (1977); and *the Whistle-*

blower's Survival Guide; Courage Without Martyrdom (1977).

As part of GAP's mission, the organization led the successful campaign to pass the Whistleblower Protection Act of 1989, for federal civil service employees. GAP has actively participated in coalitions to defend that law, related statutes such as the False Claims Act, and associated constitutional rights, including participation in television and print media debates, congressional outreach and litigation in test cases significant for occupational free speech rights.

INTRODUCTION & SUMMARY OF ARGUMENT

Recent years have seen increasing concern over public corruption and white collar crime. It has become commonplace for the United States to devote major investigative and prosecutorial resources to preventing, deterring, and punishing criminal or fraudulent conduct. In the health care field alone, Congress has devoted hundreds of millions of dollars to law enforcement efforts to stem fraud and abuse. Although law enforcement organizations and agencies concerned with public safety commonly call on citizens to come forward with information about wrongdoing, those agencies can do little to protect the truthful employee from retaliation for bringing fraud or abuse to light. Employees have been, and continue to be, terminated for seeking to protect the integrity of public programs, the safety of patients, and the like.

What makes these terminations particularly insidious is that they strike fear into the hearts of those most likely to be in a position to expose criminal schemes. Honest employees are thus forced to choose between upholding the law and retaining their jobs. This is all the more troubling since some statutes (e.g. 31 U.S.C. § 3729 et seq.) not only protect such employees from retaliation, but actually reward them with a share of the government's recovery from law-breaking entities. Respondents' construction of the law would mean that employees who bring *qui tam* actions are protected and rewarded, while those who do not seek to profit from their employer's wrongdoing are exposed to retaliation without any protection. In essence, Respondents claim that at-will employees may be denied their federal rights to cooperate with law enforcement and to testify in judicial proceedings without retaliation. Upholding the Respondents' position would chill at-will employee witnesses by allowing unfettered retaliation against those who cooperate. This flies in the face of public policy and constitutional law as enunciated by this Court in *United States v. Nixon*, 418 U.S. 683 (1974), which upheld the need for public confidence in the integrity of the judiciary, even as against claims of executive privilege.

Public policy overwhelmingly favors the right of employees to testify without such fear, so that the government may have the benefit of their testimony in federal law enforcement proceedings. This is the only result, and the one that we urge this Honorable Court to embrace, that is consistent with the express language and the history of Section 1985(2).

LEGAL ARGUMENT

A. This Nation's Public Policy Granting Citizens Their Right of Access to the Courts Is Easily Discerned and Indisputable.

1. 42 U.S.C. § 1985(2) Was Rooted in the Need to Protect Federal Witnesses.

Provisions of the Civil Rights Act of 1871 that protect access to federal courts encompass activities which are intimately linked to the essence of our government and are thus vigilantly protected.[2] One of the key civil rights "is the right to testify at a federal trial in response to a request or command of a federal district court. Our federal government has a particular interest in assuring a prospective witness that he or she will be free to respond by attending the trial of a federal indictment as a witness without being prevented from doing so by threats, molestation, or force. Otherwise, the foundations of federal justice would be undermined."[3]

McCord v. Bailey, 636 F.2d 606, 615-617 (D.C. Cir. 1980), set forth the legislative history of the statute in a manner which this Court, in *Kush v. Rutledge*, 460 U.S. at 726-727, noted was accurately and persuasively recounted. It is clear that Congress intended what has become Section 1985(2) to protect the judicial process itself, and to preserve the rule of law. The act was not aimed solely at protecting civil rights, but was also intended to ensure the orderly operation of government.

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[2] *Kush v. Rutledge*, 460 U.S. 719, 722-724 (1983). (This was another case brought under 42 U.S.C. § 1985(2) involving alleged intimidation of a federal witness.)

[3] *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1974).

2. Access to the Courts Is of Paramount Importance Under Our Constitution.

In *United States v. Nixon*, 418 U.S. 683 (1974), this Court was called on to weigh the Presidential privilege against the needs of the judicial process. President Nixon raised Presidential privilege against disclosure of confidential communications which had been preserved on tape. This Court held that the fundamental demands of due process of law in the fair administration of justice required that the Presidential privilege yield to the specific need for evidence in a pending case. This Court said:

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." (Citation omitted.) We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

418 U.S. at 708-709.

This Court went on to stress the importance such evidence has historically enjoyed under the Constitution:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

United States v. Nixon, 418 U.S. at 711.

Just as a President's need for secrecy must yield to the demands of justice to develop all facts in an adversary system, an employer's wishes to fire those who obey federal subpoenas must yield to the duty of the courts to secure relevant evidence, and protect those responding to compulsory process.

B. The Legislative History of Section 1985 Shows That It Was Intended to Protect the Enjoyment of Life and Liberty, with the Right to Acquire and Possess Property of Every Kind.

This Court has previously recognized that the history of Section 1985 establishes Congress' intent to secure "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to

pursue and obtain happiness and safety."[4] President Grant, in a message to Congress, called for passage of the Act to "effectually secure life, liberty, and property, and enforcement of law in all parts of the United States."[5]

Thus, numerous courts have recognized that where 42 U.S.C. § 1985(2) has been violated, tort damages are available in the employment context even though there is no constitutionally protected interest in a job.[6] Similarly, the Tenth Circuit has held that a crop duster who alleged that his bid for a contract was rejected because of a prior lawsuit sustained a cognizable injury.[7]

1. The Eleventh Circuit Misconstrues the Law and Is Out of Step with the Weight of Decisional Authority.

The Eleventh Circuit has confused a statutory and constitutional right of access to the courts, free of retaliation and intimidation, with a contractual obligation. The Eleventh Circuit erroneously maintained that, since an at-will employee has no constitutionally protected interest in employment, he may be subjected to

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[4] *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545-546 (1972).

[5] *Id.*, at 546.

[6] *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983); *Portman v. County of Santa Clara*, 995 F.2d 898, 909-910 (9th Cir. 1993).

[7] *Wright v. No Skiter Inc.*, 774 F.2d 422, 425-426 (10th Cir. 1985).

retaliation or intimidation for exercising his right of access to the courts. This is mistaken, for it confuses the triggering event (retaliation for attending federal court) with the source of damages (loss of a job).

In deciding *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), the Eleventh Circuit miscomprehended the nature of the rights to be vindicated and the events which trigger application of a Section 1985(2) analysis. Unlike Section 1985(3), which prohibits class-based interference with federally recognized and protected civil rights interests, Section (2) prohibits interference with access to the federal courts. Although a Section 1985(3) analysis may legitimately consider whether the right allegedly invaded is one which is protected by the Constitution, the Section (2) right of access to the federal courts is taken as a given. Freedom of contract and at-will employment are not implicated by a Section (2) analysis of whether or not a federal right has been invaded.[8]

2. That an Employee May be Subject to "At-Will" Termination Does Not Permit a Firing in Violation of Federal Law.

That a state's laws permit at-will termination of employees does not mean that a Georgia employer is free to violate federal law. The at-will employment

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[8] Testifying in a federal trial is a right protected by the Constitution. Absent this right, the very foundations of justice would be undermined. *United States v. Thevis*, 665 F.2d 616, 626 (5th Cir. Unit B, 1982); *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1973).

doctrine does not, after all, permit an employer to fire a woman because of gender bias or an Asian because of racial bias. Nor does it permit the firing of an employee for complaining of such bias to the EEOC.[9] Thus, the Eleventh Circuit erred in *Morast*, and erred here, in concluding that, since there is no constitutional right to employment, there need be no examination of whether a 1985(2) violation had occurred. In a 1985(2) analysis, the triggering event is interfering with or punishing access to the federal courts. Once that occurs, as *Irizarry* points out, if a defendant's actions fall within the prohibitions of section (2), this may trigger liability for "any economic damage that would be recognized in an ordinary tort suit."[10]

3. Sections 1985(2) and (3) Protect Witnesses, Not Just Parties, From Intimidation and Retaliation.

Although the Respondents acknowledge, as they must, that access to the courts is protected by the Act, they also claim that this means access only for parties, and not for witnesses. This is incorrect. Section 1985 protects access to the courts for witnesses and parties alike. The operative language from Section (2) states that:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely,

[9] 42 U.S.C. § 2000e-3.

[10] *Irizarry v. Quiros*, 722 F.2d 869, 871 (1983).

> fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified. . .[11]

Clearly, both parties and witnesses are to be protected from intimidation. Respondents, however, have made overly much of the fact that Section (3) refers only to parties. However, the term "parties" in Section (3) is employed in a way wholly different from that in Section (2), with the result that the phrase "party" in Section (3) refers to a party who has been injured by a act prohibited by any section of the law. Section 1985(3) states:

> [I]f two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The text of Section (3) states that the "party so injured or deprived" may sue for damages. But this section also prohibits threats or intimidation against any "citizen" who is entitled to vote. That someone is a voter, supports a candidate, or advocates for a political party does not make them a "party" in the limited sense of having merely participated in a lawsuit. Yet these

[11] 42 U.S.C. § 1985(2).

persons, too, are expressly protected by Section (3). The only conclusion possible is that the phrase "the party so injured" means the person so injured. Otherwise, the reference to voters and campaigners would be meaningless. Since to be a "party" referred to in Section (3) does not require that one be a "party" to an action, a witness as defined in Section (2) who suffers intimidation or retaliation is a "party so injured" within the meaning of Section (3).

Brever v. Rockwell International Corp., 40 F.3d 1119 (10th Cir. 1994), correctly reached this conclusion, pointing out that the narrow reading of "party" cannot be correct where the preceding portion specifically refers to witnesses as protected persons. In a case exactly like the present one, the court points out that in "a federal grand jury proceeding . . . the only 'party' according to defendants' interpretation of the statute would be the United States."[12] The court added, "To succeed on a retaliation claim, Ms. Pitts must allege a conspiracy, a nexus between the conspiracy and her grand jury testimony, and injury on account of having testified."[13] Petitioner, or any employee meeting the test, should be permitted to proceed.

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[12] *Brever*, at 40 F.3d 1119, 1125-1126, n.7.

[13] *Id.*, at 1129.

C. Without Clear Protection Under Section 1985(2) the Rights of Employees Will Depend on the Vagaries of Geography and Circumstance.

The desperate need for employee protection in the face of retaliatory firings by federal contractors and vendors is exceeded only by the confusion over what kind of reports, of what types of wrongdoing, are actually protected. Consider the anomalies in the health care field alone, unless this Court reverses the Eleventh Circuit's decision. Absent section 1985(2) protection, an employee who discovers fraud against the Medicare program may file a *qui tam* action against a provider and will be protected from retaliation.[14] Yet that same employee, testifying in federal court about the same fraudulent scheme perpetrated against private insurers or against a program funded by local government, is not protected unless he or she enjoys protection under a particular state whistleblower statute.

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[14] 31 U.S.C. § 3729 et seq. Specifically, "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection." 31 U.S.C. § 3730(h).

Imagine two persons employed by DSM Corporation, "Employee A" in Georgia, and "Employee B" in New Jersey, both discover that DSM is defrauding private insurers such as Aetna or Blue Cross. The Department of Justice, under the Health Insurance Portability and Affordability Act, convenes a grand jury to investigate DSM's wrongdoing.[15] Both employees are called before the grand jury, and both are fired. Under Respondents' construction of the law, DSM's Georgia employee is without a remedy, while the New Jersey employee will be protected by that state's Conscientious Employee Protection Act.[16]

Now imagine another Georgia employee, "Employee C", who files a *qui tam* action alleging that DSM has defrauded the Medicare or Medicaid programs in exactly the same way. Now, under Respondents' construction, "Employee A", who testified about fraud against a private program, is unprotected, "Employee C", who testified about that same fraud, but against a public program, *is* protected, and "Employee B", who testified about private fraud, but is in a different state, is also protected. The very absurdity of these results highlights why this Court must give full effect to the law as Congress intended—and must ensure a private right of action for any employee fired or retaliated against for seeking access to the federal courts.

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[15] 18 U.S.C. § 1347 et seq.

[16] N.J. Stat. Ann. 34:19-1 et seq.

CONCLUSION

The courts need to uphold the right of all citizens to come before them without fear of punishment for doing so. If the courts ensure that this right is protected, we can all have confidence that matters are decided with full and complete information, and that witnesses have freely and fully testified without fear for themselves and their families.

Amici ask this Court to reverse the decision of the Eleventh Circuit and so uphold the right of employees to have access to federal courts.

Respectfully submitted,

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APPENDIX

Pending State Whistleblower Protection Legislation

The confusion and desperation of employees struggling to protect their livelihood while remaining faithful to the law has driven an avalanche of state legislation. A bill introduced in the Alabama legislature would prohibit discrimination or retaliation against health care workers who report unsafe conditions or practices.[1] Two bills introduced in the Connecticut State Senate would extend whistleblower protection to employees of large state contractors and to foundations which support or assist state agencies.[2] The Hawaii legislature is considering three bills that would expand whistleblower protections by lengthening the statute of limitations, increasing penalties for violators, and strengthening the remedies available to whistleblowers.[3] Other proposed Hawaii legislation would expand the areas of protected conduct and reportable violations.[4] Three Michigan bills would protect employees who report violations of state law, threats to public health, safety or welfare, or participate in court actions.[5] The New Hampshire legislature similarly considered legislation to authorize com-

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[1] 1998 AL H.B. 1931.

[2] 1998 CT S.B. 457, 1998 CT S.B. 459.

[3] 1997 HI H.B. 689, 1997 HI H.B. 812, and HI S.B. 2240 (introduced January 26, 1998).

[4] 1997 HI S.B. 2423, and 1997 HI S.B. 3247 (both introduced February 2, 1998).

[5] 1997 MI H.B. 4027, 1997 MI H.B. 5263, and MI S.B. 42.

pensatory damages and attorneys fees for whistleblowing employees.[6] New York and Washington state considered legislation which would increase protections for public sector whistleblowers.[7]

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[6] 1997 NH H.B. 1662.

[7] 1997 NY A.B. 918, NY S.B. 445; and 1997 WA H.B. 1995, WA H.B. 5790.